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OCT [illegible] 1982
ALEXANDER L. STEVAS,
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No. 82-166

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ZENITH RADIO CORPORATION, *Petitioner*,

v.

THE UNITED STATES and MONTGOMERY WARD & CO., INCORPORATED, *Respondents*.

On Petition For Writ Of Certiorari To The United States Court Of Customs And Patent Appeals

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PETITIONER'S REPLY MEMORANDUM

FREDERICK L. IKENSON
(Counsel of Record)
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009
Tel. (202) 483-8900
PHILIP J. CURTIS
1000 Milwaukee Avenue
Glenview, Illinois 60025
Tel. (312) 391-8110
Attorneys for Petitioner

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PETITIONER'S REPLY MEMORANDUM[2]

INTRODUCTION

The Government would have this Court forget that it (a) acknowledged, throughout proceedings in the trial court, the existence of that court's jurisdiction and of petitioner's standing, (b) did not appeal from the trial court's preliminary injunction of December 1980, and (c) ultimately subjected itself to many months of substantial and highly revealing discovery. Now, the Government as well as Montgomery Ward pretend that it is not unusual

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[1] Effective October 1, 1982, the United States Court of Customs and Patent Appeals has merged into the United States Court of Appeals for the Federal Circuit.

[2] Pursuant to Rule 28.1, petitioner, Zenith Radio Corporation, advises that it has no parent companies, subsidiaries (other than wholly owned subsidiaries) or affiliates.

or irregular for an appellate court, in a non-party discovery dispute, with no portion of the voluminous discovery record before it, to order *sua sponte* the dismissal for lack of subject matter jurisdiction of a cause which challenges governmental action as being without statutory authority and taken in bad faith. Fortunately for our system of justice, however, such judicial action is uncommon if not unprecedented.

1. Petitioner's First Question Presented

The respondent Montgomery Ward does not dispute the claims of petitioner and the *amici curiae* that the question of statutory interpretation presented in this case is of great importance to American manufacturers and their workers. Rather, Montgomery Ward argues that the statutory question is not substantial because the conclusion reached by the Court of Customs and Patent Appeals (CCPA) "is wholly consistent with two prior decisions of the Court of International Trade rejecting the precise claims raised here." Montgomery Ward's brief at 7.

The argument is wholly invalid. Judge Maletz, who issued the two cited Court of International Trade decisions, found no repugnancy between the specific 1979 enactment (giving domestic interests the right to participate in and seek judicial review of antidumping duty determinations) and the old, general compromise authority contained in section 617 of the Tariff Act of 1930 because—

> Any person adversely affected by the decision to settle may then seek judicial review of the Secretary's action. Considering that judicial review is thus available and that settlement may expedite the collection of antidumping duties, these procedures

> do not frustrate the Congressional purpose underlying section 751.

Pet. App. 108a. Of course, once the CCPA concluded that judicial review of the Secretary's action is *not* available, the underpinnings of Judge Maletz's decision collapsed and, indeed, Judge Maletz himself remarked that our petition was raising important questions of statutory law for review by this Court. Pet. App. 111a.

Neither does the Government dispute the importance of the statutory issue to domestic industry and labor. However, in trying to validate the Court of International Trade's decision, which the Government suggests the CCPA implicitly endorsed, the Government has had to resort to the unfortunate tactic of quoting at length, but selectively, from the trial court's opinion. Government's brief at 9-10, 15. *Omitted from the Government's quotations are the two sentences quoted above by petitioner which formed the core of the court's reasoning.* Clearly, the trial court recognized that Congress, in 1979, was extremely concerned over domestic interests' having been excluded from the antidumping decisionmaking process and consequently took specific steps to assure domestic interests' right to be involved in that process.

The Government's suggestion that Congress intended the Executive Branch to have the authority to enter into unreviewable compromises of antidumping cases without the participation of domestic interests at the same time that it intended such interests to have the unquestionable right to participate in the decisionmaking and review process cannot withstand scrutiny. The issue presented is simply too critical to domestic industry and labor to turn on such frivolousness. Review by this Court and indeed summary reversal have been shown to be warranted.

2. Petitioner's Second Question Presented

With respect to the "bad faith" issue, the respondents would have this Court believe that the CCPA has made essentially a factual determination which, as such, does not merit this Court's attention. However, the question presented for review is legal in nature and vitally important to administrative law.

The CCPA never disputed the evidence of bad faith on the part of officials of the Treasury Department and the Office of the Special Trade Representative. Rather, the court believed that such bad faith was irrelevant, that the decision to settle was the personal decision of the Secretary of Commerce, and that any legal wrong to petitioner must be based on the Secretary's violations of the procedures set forth in the settlement statute. Pet. App. 16a, 19a.

Thus, the CCPA was unconcerned about (or unaware of) the following facts:

(a) In May 1977, the Special Trade Representative made a commitment to Japanese Government officials which they interpreted to mean that the United States would not assess any more (mandatory) antidumping duties on imported Japanese television sets.

(b) In early 1978, scores if not hundreds of United States Customs officials were preparing—with the approval of the Commissioner of Customs and Treasury Department officials—to assess almost $400 million of antidumping duties on imported Japanese television sets, on March 31, 1978. On March 30, 1978, following a meeting between Treasury Department and Japanese Government officials, Customs Headquarters issued instructions to the various Customs field offices to assess only $46 million in antidumping duties.

(c) Following the events of March 1978, there were numerous occasions on which U.S. Government officials strained to assist and accommodate the Japanese interests in an effort to prevent the enforcement of our law. Some of these are described in the brief of *amici curiae*, The Committee To Preserve American Color Television, *et al.*, at 12-13. Among other things, an attorney reporting to the General Counsel of the Treasury Department was designated the chairman of a special television task force, in which capacity he exerted pressure on Customs auditors and attorneys to take positions on factual and legal issues contrary to their beliefs and hospitable to the Japanese interests.

(d) In late 1979, a Deputy Special Trade Representative consulted with Japanese television manufacturers' representatives in an effort to accommodate their interests in the television antidumping proceeding.

(e) In January 1980, the responsibility for administering the antidumping laws was transferred from the Secretary of the Treasury to the Secretary of Commerce—in large part because of Congress' dissatisfaction with Treasury's mishandling of the television case. The former special television task force chairman became an Assistant General Counsel at the Office of the United States Trade Representative (USTR), where he proceeded to work on the television case and to orchestrate the settlement that was to occur. As part of this orchestration, he (i) prepared a memorandum for the Commissioner of Customs' signature, (ii) prepared a memorandum for the Secretary of Commerce to the USTR, requesting the latter's "assistance" in developing a plan for "moving forward" on the television antidumping case, (iii) met with Japanese Government officials in Japan on two occasions in March 1980—once by himself and a second time,

accompanied by the Commerce Department's General Counsel, and (iv) furnished that General Counsel with his quantification of the allegedly (and grossly understated) maximum antidumping duty liability on Japanese television sets which he developed at Treasury and the USTR's office. Indeed, this USTR official submitted the notes described in our petition at 14-16 to the Commerce Department's General Counsel. The USTR official advised the General Counsel that the notes—taken during an earlier negotiating session with Japanese officials and discussing how to circumvent our antidumping law—are "still applicable" and that "I intend to use these documents as the basic documents for your trip to Japan."[3]

We submit that there is something disastrously wrong with a rule of law which forecloses judicial review of the settlement agreements on some theory that the decision to settle was the personal decision of the Secretary of Commerce. Petitioner's allegations of bad faith are substantial and—contrary to the suggestions of respondents—were not refuted by the court below. Without even considering the motives of the Secretary, the information submitted to him was severely tainted. Under the circumstances, judicial review cannot be limited to determining simply whether a customs officer's report and a General Counsel's recommendation were delivered to the Secretary. Such a circumscribed review would make a mockery of the judicial process.

In finding that petitioner failed to plead a proper cause of action and in preventing petitioner from bringing its case to trial, the CCPA improperly shielded alleged gov-

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[3] The Government's statement that these notes are irrelevant to the 1980 settlement (Opposition at 17 n.16) is incorrect. Also, *see* Petition at 14 n.17.

ernmental misconduct from judicial scrutiny. Should this case not be disposed of on the basis of the statutory authority question, it should be remanded to the trial court so that a full record may be developed with respect to the material facts in issue.[4] *See Dombrowksi* v. *Eastland*, 387 U.S. 82, 84 (1967) ("In the absence of the factual refinement which can occur only as a result of trial, we need not and, indeed, could not express judgment as to the legal consequences of such collaboration, if it occurred."). *See also Board of Education, Island Trees Union Free School District No. 26* v. *Pico*, ___ U.S. ___, 102 S.Ct. 2799 (1982); *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 257 (1948).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

FREDERICK L. IKENSON
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009
Tel. (202) 483-8900
PHILIP J. CURTIS
1000 Milwaukee Avenue
Glenview, Illinois 60025
Tel. (312) 391-8110
Attorneys for Petitioner

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[4] We consider the alleged "factual" history set forth in the Government's opposition to be woefully inaccurate and incomplete.